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COURT OF CRIMINAL APPEALS
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IN THE COURT OF CRIMINAL APPEALS OF TEXAS

TEODORO HERNANDEZ, APPELLANT

V.

THE STATE OF TEXAS, APPELLEE

APPELLANT'S RESPONSE BRIEF

FROM THE DECISION IN THE SIXTH COURT OF APPEALS
CAUSE NO. 06-15-00167-CR

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ORAL ARGUMENT RESPECTFULLY REQUESTED

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STATEMENT REGARDING ORAL ARGUMENT

Appellant believes oral argument would aid the Court in assessing the legal questions presented in this case and how the facts interact with the legal principles and case law of this Court regarding the hypothetically correct jury charge.

STATEMENT OF FACTS

CHARGES AND JURY VERDICTS

On May 7, 2014 Appellant was indicted for aggravated sexual assault, aggravated assault with a deadly weapon (water), and assault/family violence (strangulation). CR at 65-66.

Count I of the indictment alleged that Appellant sexually assaulted Melanie Molien by penetrating her sexual organ with his finger and that, in the course of the same criminal episode, 1) he attempted to kill her by strangulation and waterboarding, 2) he threatened to cause, or place her in fear that, death or serious bodily injury would be imminently inflicted, and 3) that he used or exhibited a deadly weapon, to wit, water. CR at 65.

Appellant was convicted of the lesser-included offense of sexual assault. CR at 131.

Count II alleged that Appellant caused bodily injury to Melanie Molien by striking her head or body with his hands and during the commission of that assault used or exhibited a deadly weapon, to wit, water. CR at 66.

Appellant was found guilty of this offense. CR at 133.

Count III alleged that Appellant caused bodily injury to Melanie Molien, a person with whom he had a dating relationship, by impeding her normal breathing or circulation of her blood by applying pressure to her neck or throat and blocking her nose or mouth. CR at 66.

Appellant was found not guilty of this offense. CR at 135.

SEXUAL ASSAULT

Appellant and the complainant were in a romantic relationship. 5RR at 61. They had been dating for two years and had broken up the week before, after she punched him in the face. 5RR at 61, 68-69. Both he and the complainant described a pattern of jealously on both of their parts. 5RR at 68-69; 7RR at 121.

The complainant testified that on March 21, 2014, after texting her, Appellant came to her door and she let him in. 5RR at 71-72. She said he was enraged, "acting crazy", and he looked in her bedroom to see if there was a man in there. 5RR at 72-73. She followed him into the bedroom. 5RR at 72. She said that they were both screaming at each other about whether she was cheating. 5RR at 104-05.

The complainant then testified that he took her clothes off and scanned her body looking for bruises or other signs that she was cheating. 5RR at 74. She said she bruised easily during consensual intercourse, and other activities, and that he had checked her body for signs of cheating frequently in the past. 5RR at 74, 134-35; 7RR at 127. After he scanned her body, she said he put his fingers in her vagina and said "This is how you want it. This is how you want it, huh?" 5RR at 74. This lasted no longer than 20 seconds. 5RR at 75.

ASSAULT BY STRIKING WITH HANDS

The complainant testified that Appellant engaged in two physical assaults after inserting his fingers in her vagina. First, she said that after the penetration, he asked her who she was sleeping with and then hit her in the face. 5RR at 76. She said he proceeded to hit her around twenty times with his hand. 5RR at 76-77. She said she defended herself by protecting her head and face. 5RR at 79. The complainant's bruises were not life-threatening. 7RR at 31.

Appellant admitted that he repeatedly struck her with his hand. 7RR at 136-41. His injuries were consistent with striking her with an open palm. 6RR at 112. He did not have injuries to his knuckles or fists, 6RR at 108; 13RR, D-1-3, at 97-99, but did have a bruise on his right palm. 6RR at 112; 13RR, D-4, at 100.

ASSAULT BY STRANGULATION AND WATER AS A DEADLY WEAPON

After he stopped hitting her, the complainant said she asked Appellant for a glass of water and he left the room. 5RR at 77-78. She said she tried to close the door, but he saw her and returned to the room screaming, "Neither one of us are going to make it out alive." 5RR at 80. She said he rushed in with a bottle of water, "threw the water in my mouth" and started choking her at the same time. 5RR at 80. She said he choked her with his left hand around her throat and poured water down her throat with the other hand. 5RR at 81. She then testified that the water was in a one-gallon jug that was around three-quarters full and that he poured nearly the whole thing down her mouth. 5RR at 83-84, 112.

There was conflicting expert testimony as to whether the complainant had a physical injury called a "petechia" that could come from being choked. 6RR at 144-45; 7RR at 26-27; 8RR at 80-84. A SANE nurse testified that she had no physical evidence that water was introduced into the complainant's body. 7RR at 21. No CAT scan was done of her chest. 7RR at 22.

Officer Michael Casillas, the investigating officer, testified that he found a water jug in the kitchen that was nearly empty and found a jug cap on the nightstand. 6RR at 67-68, 76; 13RR, S-28-31, 42-43, at 35-38, 49-50. The officer who responded that morning did not notice any water on the floor. 5RR at 53. The complainant testified that the lid wasn't on the bottle when Appellant came into the

room. 5RR at 140-41. When asked how it could have gotten into her room, she said she could not remember whether it was on the jug or not when Appellant entered the room. 5RR at 141. The complainant also testified that this assault happened on the floor, while her head was touching a television that was on the ground. 5RR at 109, 113. Defense counsel argued that the photograph of the television showed that there were no water splashes in the dust on the screen. 8RR at 168; 13RR, S-37, 45, at 44, 52.

The complainant could not remember how fast Appellant was pouring the water on her. 5RR at 86. She answered in the affirmative when asked if it was "going into her orifices," but shortly thereafter said she couldn't remember if it was going into her nose and mouth. 5RR at 86-87.

The complainant said she almost blacked out while Appellant was choking her and pouring water on her face. 5RR at 87. She said she was scratching his face, hitting him in the face, and putting her hand in his cheek. 5RR at 109-10, 143-44. Because she felt like she was dying she said she did everything she could to get him off of her and she got her legs underneath him and kicked him so hard he went flying across the room and hit the window. 5RR at 87-88, 139. There was no bruising on appellant's torso. 6RR at 107-08. She said he calmed down at this point and they went outside to the patio to smoke cigarettes and talked for around

an hour. 5RR at 89-91. Appellant could not be excluded as a contributor to the DNA found under the complainant's fingernails. 7RR at 59-60.

Appellant testified that after he stopped hitting the complainant with his hands, she asked him to get her a glass of water. 7RR at 141. He said he went to the kitchen, filled a red cup with ice and poured water from a water jug into it. 7RR at 142. He said he also put some ice in a plastic bag for her face and got some aspirin. 7RR at 142. He said when he reentered the room, she was dressed and sitting on the bed. 7RR at 142. He gave her the cup of water, ice, and aspirin and put the cap of the jug on the nightstand. 7RR at 142. He said he did not touch her neck, strangle her, or pour water on her. 7RR at 151-52. They then went outside to have a cigarette. 7RR at 143. A red cup was found on the patio and a plastic bag on the complainant's bedroom floor. 13RR, D-5, at 101; 13RR, S-36, at 43.

After going outside, Appellant and the complainant both testified that they talked and smoked cigarettes on the patio, but both disagreed about some aspects of their interaction while out there, namely, whether Appellant made a motion to pick her up to carry her inside to put her to bed and stopped when she screamed or whether Appellant grabbed her to take her inside to perform oral sex on him and stopped when she screamed and clung to a water hose. 5RR at 89-93; 7RR at 103-12, 143-47; 6RR at 101-03.

When Appellant left, the complainant called 911. RR, Audio Recording, PART001.

CHARGE CONFERENCE

At the charge conference the State asked the trial court to include hands as the deadly weapon used or exhibited in Count II, in addition to water. 8RR at 110-19, 121-23. Defense counsel objected, saying that doing so would violate Appellant's due process right to notice and that she might have hired an expert on hands if that had been an allegation. *Id.* at 119-21. She also said that there was no evidence that hands were used or exhibited as a deadly weapon during the assault in Count II. *Id.* at 122-23. The trial court sustained defense counsel's objection and did not insert hands into the jury charge. *Id.* at 123; CR at 83.

DISPOSITION IN THE SIXTH COURT OF APPEALS

The Sixth Court of Appeals held that, because there was no evidence that Appellant used or exhibited water in any manner during the commission of the assault in Count II of the indictment, the evidence was insufficient to sustain Appellant's conviction for aggravated assault. *Hernandez v. State*, No. 06-15-00167-CR, 2016 WL 4256938, at *4-8 (Tex. App.—Texarkana Aug. 5, 2016) (mem. op., not designated for publication). It reversed that conviction, ordered a conviction for the lesser-included offense of assault to be entered, and remanded

the case to the trial court for a new punishment hearing on the assault conviction. *Id.* at *9.

SUMMARY OF ARGUMENT

The deadly weapon allegation in the case at bar was material and should be included in the hypothetically correct jury charge. Changing water to hands deprives Appellant of the notice required to adequately prepare a defense. The record in this case bears that out, as Appellant focused his defense on the water allegations made by the complainant, did not focus on how his hands were used or threatened to be used, and defense counsel would have called an expert on the use of hands if such an allegation had been made. In addition, the water allegation was a statutory alternative allegation that is always material. A deadly weapon allegation is one of two alternative methods of committing aggravated assault and has a specific statutory definition. Having chosen one alternative the State was bound to prove it as pled. Finally, federal due process forbids upholding a conviction on the basis of factual questions not presented to the jury. Because "hands" were not submitted to the jury, they cannot now be used to uphold his conviction.

A reviewing court also cannot look to a different offense or unit of prosecution in conducting a sufficiency review. Assessing sufficiency of the evidence by a different assault, as the State requests, would violate this basic

principle. Moreover, Appellant was acquitted of the second assault of which he was accused and measuring sufficiency by that allegation would violate the Double Jeopardy Clause.

Finally, a deadly weapon must be used or exhibited when the gravamen of the offense took place. The gravamen of bodily injury assault is causing an injury. A deadly weapon was not used or exhibited during the offense if it was only used or exhibited after the injury was sustained. Moreover, a deadly weapon cannot facilitate the infliction of injury, as required, if it was not in play until after the injury was sustained.

ARGUMENT

I. RESPONSE TO STATE'S FIRST ISSUE: THE WATER ALLEGATION WAS MATERIAL.

The indictment in the case at bar alleged that Appellant caused bodily injury to Melanie Molien by striking her with his hands and during the commission of that assault used or exhibited a deadly weapon, to wit, water. CR at 66.

In its first issue, the State contends that which deadly weapon was used was not a material allegation and that, therefore, the State did not have to prove that the weapon alleged in the indictment was used or exhibited during the assault in question. State's Brief at 5-11. Instead, it argues that evidence of any deadly weapon used or displayed during the commission of the assault is sufficient to

support a conviction of aggravated assault. *Id.* For the reasons discussed below, the State is incorrect. The named deadly weapon was vital to Appellant's ability to prepare a defense, constituted a material statutory allegation, and inferring that any other object was found to have been a deadly weapon would subvert the fact-finding role of the jury.

Sufficiency of the evidence is measured by the hypothetically correct jury charge. *Malik v. State*, 953 S.W.2d 234, 240 (Tex. Crim. App. 1997). "Such a charge would be one that accurately sets out the law, is authorized by the indictment, does not unnecessarily increase the State's burden of proof or unnecessarily restrict the State's theories of liability, and adequately describes the particular offense for which the defendant was tried." *Id*. The hypothetically correct jury charge cannot include facts or legal theories based on which a defendant was not actually tried and convicted. *Wooley v. State*, 273 S.W.3d 260, 268 (Tex. Crim. App. 2008).

When a statute sets out several alternative methods of committing an offense, and the indictment alleges only one of those methods, the State must prove the method it elected to include in the indictment. *Geick v. State*, 349 S.W.3d 542, 545 (Tex. Crim. App. 2011); *Cada v. State*, 334 S.W.3d 766, 773–74 (Tex. Crim. App. 2011). Such allegations are always material. *Id.*

Where non-statutory allegations are at issue, however, variances between what was pled in the indictment and what was proven at trial that are "immaterial" do not have to be proven exactly as pled. *Gollihar v. State*, 46 S.W.3d 243, 256 (Tex. Crim. App. 2001). This Court has described this as allowing for "little mistakes" that lead to a difference between what was pled and what was proven so long as a defendant's substantial rights are not prejudiced. *Johnson v. State*, 364 S.W.3d 292, 295 (Tex. Crim. App. 2012).

The assessment of what should be included in the hypothetically correct jury charge is always guided by the demands of due process and double jeopardy, namely, whether a defendant was informed of the charges against him sufficiently so that he could prepare an adequate defense and whether a defendant would be protected against subsequent prosecution for the same crime. *Gollihar*, 46 S.W.3d at 257.

1. Holding that water was not a material allegation would violate Appellant's due process right to adequate notice and his right to prepare a defense.

The State argues that there is only one test for determining what factual allegations must be included in the hypothetically correct jury charge. State's Brief at 8-10. Citing *Johnson v. State*, it contends that a reviewing court only has to ask whether a factual averment defined the unit of prosecution. *Id.*; *Johnson*, 364 S.W.3d 292.

This view is not consistent with this Court's precedent. The demands of due process are fundamental to the hypothetically correct jury charge inquiry and, ultimately, to the sufficiency standard set out in *Jackson v. Virginia*. *Gollihar*, 46 S.W.3d at 257 *citing Jackson v. Virginia*, 443 U.S. 307 (1979). The "units of prosecution" inquiry in *Johnson v. State* did not replace the due process test in *Gollihar*, but merely offered another framework to help courts determine whether a particular allegation is material. *Johnson*, 364 S.W.3d at 295-98; *Gollihar*, 46 S.W.3d at 257. The Court made this clear in *Ramos v. State* where it evaluated sufficiency of the evidence by looking both to the units of prosecution test in *Johnson* and the notice test in *Gollihar*. *Ramos v. State*, 407 S.W.3d 265, 270-71 (Tex. Crim. App. 2013) (both the gravamen of the offense and whether adequate notice was provided are part of the "framework of analysis and guide us when determining whether a variance in pleading and proof is material in regard to legal sufficiency").

The Court must ask whether Appellant was informed of the charges against him sufficiently so that he could prepare an adequate defense. *Gollihar*, 46 S.W.3d at 257. This is an indispensable aspect of determining what must be included in the hypothetically correct jury charge. *Id.* at 256 ("[T]he hypothetically correct charge would include an indictment allegation which is necessary to give the defendant adequate notice of the charge against him so as to meaningfully defend himself.").

In *Flenteroy v. State*, cited by the State, the Court did not hold that all deadly weapons allegations are immaterial. State's Brief at 11. Rather it used the notice framework set out in *Gollihar* to determine whether a variance was material between an allegation in the indictment that a screwdriver was used or displayed as a deadly weapon and a jury verdict finding that a hard metal object was used or displayed as a deadly weapon. *Flenteroy v. State*, 187 S.W.3d 406, 411-12 (Tex. Crim. App. 2005).[1] The question was "whether the indictment 'informed appellant of the charge against him sufficiently to allow him to prepare an adequate defense at trial.'" *Id.* at 411 *quoting Gollihar*, 46 S.W.3d at 248. In *Flenteroy*, the defense was not impacted, as the defendant denied using any metal object of any kind. *Id.* Thus, if the State had alleged a "hard metal object" rather than a "screwdriver" the defense would not have been different. *Id.*

Here, the State alleged that Appellant struck the complainant with his hands while using or exhibiting water as a deadly weapon. CR at 66. This required the State to prove that water "in the manner of its use or intended use" was "capable of causing death or serious bodily injury." Tex. Penal Code Ann. §1.07(a)(17)(B) (West). It adduced evidence that Appellant choked the complainant by pouring

[1] The hypothetically correct jury charge was not at issue in *Flenteroy*. The issue before the Court was the notice required when the State intends to seek a deadly weapon finding at punishment. *Id.* at 410-11.

water down her throat.[2] 5RR at 80-81, 83-84, 112. The use of the water, and its potential for causing death or serious bodily injury was heavily disputed at trial. Both parties hired experts to testify to the evidence surrounding the use of water and the evidence that it had been used in the manner alleged. 6RR at 144-45, 149-52; 7RR at 6-8, 21-24; 8RR at 70-84. Defense counsel spent significant time going over the evidence at the crime scene and argued that the evidence didn't support the contention that water had been used as the complainant claimed, but was only brought in because she was thirsty. *See, e.g.*, 5RR at 53, 112, 140-43; 7RR at 141-42; 8RR at 70-71, 84, 167-72; 13RR, S-37, 45 at 44, 52.[3]

Now the State wishes to infer a finding by the jury that Appellant's hands, in the manner of their use or intended use were "capable of causing death or serious bodily injury." §1.07(a)(17)(B). The Sixth Court of Appeals was correct in rejecting this position, as doing so would deprive Appellant of his fundamental right to notice and his ability to prepare a defense. *Hernandez*, 2016 WL 4256938, at *8. There is a significant difference between the evidence required to show that Appellant exhibited water as a deadly weapon while inflicting an injury with his hands and what would be required to show that Appellant used or exhibited his hands as a deadly weapon while inflicting injury with his hands. Given the facts of

[2] As discussed on Section II, this was after the assault in Count II was complete. 5RR at 76-81.

[3] The jury acquitted Appellant of the assault charge stemming from this incident. CR at 66, 92.

this case, a defense of the latter allegation would have required the defense to put on evidence related to the severity of the injury itself and the manner of its infliction, something defending against the water allegation did not require.

Because Appellant did not know that he was being accused of using his hands as a deadly weapon, he did not prepare a defense on that charge. *See* 8RR at 119-22. Whether the bruising of complainant's body, or the manner in which he struck her, was capable of causing death or serious injury was not an issue on which he focused his defense. He admitted that he struck her with his hands, 7RR at 136-41, but little time was spent on whether that striking was capable of causing death or serious bodily injury. *See, e.g.,* 5RR at 95 (The complainant testified that she was checked for a concussion, but not being an issue at trial, no party asked her the results of the testing.). And, as defense counsel noted during the charge conference, she might have hired an expert to testify on Appellant's use of his hands, if that had been an allegation in the indictment. 8RR at 120. *Hernandez,* 2016 WL 4256938, at *8. (Water "was not a 'needless' allegation; instead, it was a very relevant factor, one upon which Hernandez would have had to concentrate in order to prepare his defense.").

The State minimizes the importance of an allegation that transforms a misdemeanor to a felony. State's Brief at 10. Without using or exhibiting a deadly weapon, Appellant did not commit aggravated assault. Tex. Penal Code Ann.

§22.02(a)(2) (West). He had a due process right to adequate notice of the State's allegations, not only regarding simple assault, but also regarding the aggravated assault allegation. Changing "water" to "hands" in the case at bar "would allow for [a] conviction[] where the evidence did not remotely resemble the allegations." *Geick*, 349 S.W.3d at 548.

2. This Court has already held that similar allegations are material because they are an integral part of an alternative statutory allegation.

The State's argument in its first issue relies primarily on this Court's opinion in *Johnson v. State*, but the holding in *Johnson* is not controlling in the case at bar. State's Brief at 6-11. *Johnson* was about the manner and means of causing an injury, not about the statutory alternatives in the aggravated assault statute. *Johnson*, 364 S.W.3d at 298-99. In *Johnson*, the defendant was accused of causing serious bodily injury under §22.02(a)(1), but the question in that case was unrelated to the statutory alternative chosen by the State. *Id.* Rather, the only question was the materiality of the manner and means of causing the injury. *Id.*

Here, by contrast, there is no question that Appellant caused bodily injury by striking the complainant. The question is whether he engaged in additional conduct during the assault that rendered the misdemeanor a felony offense. §22.02(a)(2); §1.07(a)(17)(B). That conduct is a statutory alternative nature-of-conduct allegation with a specific statutory definition that must be proven beyond a

reasonable doubt. *Id.*; *Landrian v. State*, 268 S.W.3d 532, 543 (Tex. Crim. App. 2008) (Price, J., concurring) ("This is a nature-of-conduct type factor."). As will be discussed below, the allegation as to how the State intends to meet the requirements of this definition cannot be edited out of the hypothetically correct jury charge.

A variance regarding statutory language that defines the offense is always material. *Johnson*, 364 S.W.3d at 294–95. This is not limited to statutory language that defines the unit of prosecution, but extends to any essential elements of a crime. *See Gollihar*, 46 S.W.3d at 255 n.18.

In *Curry v. State*, the Court of Criminal Appeals held that the entire phrase "by using and threatening to use deadly force namely, a firearm" must be included in the hypothetically correct jury charge. *Curry v. State*, 30 S.W.3d 394, 398, 405 (Tex. Crim. App. 2000) *cited by Gollihar*, 46 S.W.3d at 255 n.18. In *Curry*, that phrase was one of two statutory alternative means of proving the *mens rea* of kidnapping. *Curry*, 30 S.W.3d at 405. Having chosen "using or threatening to use deadly force" in the indictment, the State was bound by that choice. *Id.* Significantly for the purposes of this case, it was not bound only by the bare language of that statutory alternative, but by its specification of the object in the indictment: a firearm. *Id.* at 405-06.

The holding in *Curry* was subsequently cited with approval by the Court in *Gollihar*, as recognizing that a statutory alternative element, once chosen by the State in the indictment, must be proven as pled. *Gollihar*, 46 S.W.3d at 254-56. The *Gollihar* Court characterized the inclusion of the phrase in *Curry* as exemplifying the principle that such allegations are not merely descriptive, but are "an integral part of an essential element" and must be included in the hypothetically correct jury charge. *Id.* at 254, 254 n.15 ("a hypothetically correct jury charge would not simply quote from the controlling statute").

In the case at bar, the State selected one of two statutory alternative methods of proving that the bodily injury assault committed when Appellant struck the complainant with his hand was aggravated. It chose the option in §22.02(a)(2), that Appellant used or exhibited a deadly weapon. As in *Curry*, the named object was not merely descriptive, but was "an integral part of an essential element." *Gollihar*, 46 S.W.3d at 254. The State was required to prove this allegation as pled in the indictment.

This conclusion is further supported by the fact that "deadly weapon" has statutory criteria that must be proven beyond a reasonable doubt. Whether an object is a "deadly weapon" depends on whether the State can prove beyond a reasonable doubt that "in the manner of its use or intended use" it was "capable of causing death or serious bodily injury." §1.07(a)(17). The object chosen by the

State in the indictment embodies the allegation that it meets the definition of "deadly weapon." This was a statutory allegation that defines the offense of aggravated assault. *Hernandez*, 2016 WL 4256938, at *8 ("The State selected a factual allegation that was an integral part of the charge against Hernandez."). Just as the State was bound by its choice of "firearm" in *Curry*, the State is bound by its choice of "water" here. *Curry*, 30 S.W.3d at 405. The State's contentions to the contrary should be overruled.

3. The State's position would violate federal due process by affirming a conviction on a factual basis not submitted to the jury.

If a conviction is affirmed on appeal it must be on the basis of factual questions that were actually submitted to the jury. Both the Court of Criminal Appeals and the U.S. Supreme Court have held that this is a fundamental precept of federal due process. *Wooley*, 273 S.W.3d at 268 *quoting Malik*, 953 S.W.2d at 238 n.3 ("[D]ue process prevents an appellate court from affirming a conviction based upon legal and factual grounds that were not submitted to the jury."); *Dunn v. United States*, 442 U.S. 100, 106 (1979) ("a defendant's right to be heard on the specific charges of which he is accused" is one of the "basic notions of due process"); U.S. Const. Amends. V, XIV.

This rule is not about whether there was a variance between the indictment and the proof at trial. *Dunn*, 442 U.S. at 105-06. Rather, it is a recognition of the basic principle that appellate courts are not fact finders and therefore "appellate

courts are not free to revise the basis on which a defendant is convicted." *Id.* at 107. In *Dunn*, the indictment alleged that the defendant committed perjury at a September 30 interview. *Id.* at 102-05. That was the theory on which the case was tried and submitted to the jury.[4] *Id.* at 106. The defendant was convicted. *Id.* at 104. On appeal it was recognized that the September 30 interview did not meet the criteria for a proceeding at which perjury could be committed. *Id.* at 104-05. The appellate court, however, affirmed the conviction because there was also evidence introduced at trial that the defendant committed perjury at an October hearing. *Id.* The U.S. Supreme Court held that the appellate court violated federal due process in looking to a fact question upon which the jury did not render a verdict. *Id.* at 105-07. The fact that sufficient evidence was introduced as to the October hearing could not justify looking to that evidence on appeal where it was not the factual basis of the conviction. *Id.* at 106-07.

The Court of Criminal Appeals reached the same result in *Wooley v. State*. There, the jury was instructed to find whether a defendant "aided Velez" in committing murder. *Wooley*, 273 S.W.3d at 263. In a sufficiency review, the Court of Appeals assessed whether there was sufficient evidence that he "aided Velez or another" because that language would be in the hypothetically correct jury charge.

[4] Although the charge did not mention the September 30 interview, the jury charge admonished the jury to render its verdict based on the indictment and trial counsel focused their argument on the September 30 statements. *Dunn*, 442 U.S. at 106 n. 4.

Id. at 265-66. The Court of Criminal Appeals held that this violated federal due process because whether Velez aided "another" was not a fact question submitted to the jury. *Id.* at 271-72. *See* Tex. Crim. Proc. Code Ann. Art. 36.13 (West) (jury is exclusive judge of facts); Tex. Crim. Proc. Code Ann. Art. 38.04 (West) (jury is exclusive judge of weight to be given to testimony).

Under this rule, only the "factual grounds" actually submitted to the jury can be the basis for upholding a criminal conviction. *Wooley*, 273 S.W.3d at 268. This rule does not alter the fact that sufficiency is measured by the hypothetically correct jury charge. Rather, it says that a reviewing court cannot use facts in a sufficiency review that were not included in the actual jury charge. *Dunn*, 442 U.S. at 106-07; *Wooley*, 273 S.W.3d at 269 (Tex. Crim. App. 2008) *quoting McCormick v. United States*, 500 U.S. 257, 270 n. 8 (1991) ("Appellate courts are not permitted to affirm convictions on any theory they please simply because the facts necessary to support the theory were presented to the jury.").

At Appellant's trial, "hands" as a deadly weapon were not submitted to the jury. CR at 80-83. Nothing in the jury's verdict allows a reviewing court to conclude that the jury found beyond a reasonable doubt that hands were used or intended to be used in a manner capable of causing serious injury or death. CR at 80-83, 91. As in *Wooley*, affirming a conviction based on "hands" would be looking to "factual grounds that were not submitted to the jury." *Wooley*, 273

S.W.3d at 268. *Cf.*, *Flenteroy*, 187 S.W.3d at 410-11 (deadly weapon allegation upheld on the basis of the weapon actually found by the jury to have been proven beyond a reasonable doubt).

The aggravating element was an essential element of this crime. §22.02(a)(2). Appellant had a due process right to have a jury determine whether it was proven beyond a reasonable doubt. *Jackson*, 443 U.S. at 318-19; Art. 36.13; Art. 38.04. The jury entered a verdict solely as to water. CR at 80-83. It did not entertain the possibility of hands as a deadly weapon.[5] "Hands" cannot now be used to affirm his conviction. *Hernandez*, 2016 WL 4256938, at *8 (the State "cannot now assume that the jury substituted Hernandez' hands as the deadly weapon"). The State's proposed disposition of this issue would violate federal due process by asking the reviewing court to convict him of aggravated assault based on an allegation not presented to the jury and for which he was not tried. *Wooley*, 273 S.W.3d at 268; *Dunn*, 442 U.S. at 106-07.

[5] The jury acquitted Appellant of using his hands to strangle the complainant. CR at 92. He was also acquitted of threatening to cause, or place, the complainant in fear that death or serious bodily injury would be imminently inflicted during the sexual assault. CR at 65; 90. *Davis v. Herring*, 800 F.2d 513, 519 (5th Cir. 1986).

4. The Sixth Court of Appeals did not find that there was sufficient evidence that hands were used or exhibited as a deadly weapon during the commission of the assault.

The State's request for relief in its first issue depends on a mischaracterization of the holding of the court below. State's Brief at 11. The State asserts that the Sixth Court of Appeals held that there was sufficient evidence that hands were used as a deadly weapon during the assault, but refused to uphold the conviction because of the materiality question. State's Brief at 7. That is not the case. The Sixth Court never assessed whether there was sufficient evidence that hands were a deadly weapon.[6] *Hernandez*, 2016 WL 4256938, at *8.

The State quotes a portion of the Sixth Court's opinion, which says that the State was *free to allege* in the indictment that Appellant "struck Molien by using or exhibiting his hands as a deadly weapon," but chose not to do so. *Hernandez*, 2016 WL 4256938, at *8; State's Brief at 7. The Court of Appeals did not hold that this was an "act proved at trial," State's Brief at 7, but rather used that language to describe an allegation that the State did not make. *Hernandez*, 2016 WL 4256938, at *8.

[6] If it had, it would have reached the conclusion that there was insufficient evidence. The State did not try this issue and a rational jury simply would not have a factual basis from which to determine beyond a reasonable doubt that the manner in which Appellant struck the complainant or intended to strike her was capable of causing death or serious bodily injury. *See, e.g.*, 6RR at 112 (photograph of Appellant's hands consistent with striking with open palm); 7RR at 31 (bruises not life-threatening).

Aside from the inaccurate assertion that this issue has already been resolved by the court below, the State does not argue that there was sufficient evidence from which a rational jury could conclude that hands were used or exhibited as a deadly weapon during the commission of the assault. Because it was not the subject of the decision of the court below, that sufficiency question is not before this Court. *Stringer v. State*, 241 S.W.3d 52, 59 (Tex. Crim. App. 2007) (State's argument not ripe for review because not addressed by Court of Appeals).

However, the State does point to record evidence pertaining to Count III, where the complainant said Appellant choked her with his hand in an assault that took place subsequent to the one at issue in its first issue. State's Brief at 7, n. 17. Reliance on evidence from conduct that took place after the "commission of the assault" is the subject of the State's second issue. State's Brief at 12. Appellant will address that contention in the next section.

II. RESPONSE TO STATE'S SECOND ISSUE: SUFFICIENCY MUST BE MEASURED BY THE SAME OFFENSE IN THE INDICTMENT AND THE DEADLY WEAPON MUST FACILITATE THE UNDERLYING CRIME.

The State makes two arguments in its second issue. Appellant will address each of them in turn.

1. State's first contention in second issue: measuring sufficiency by a different assault.

First, the State argues that sufficiency of the evidence should not be measured by the incident where Appellant caused bodily injury by striking the complainant on her head and body with his hands, but instead should be measured by any assaultive conduct of which there was evidence adduced at trial. State's Brief at 14-16.

Appellant was charged with two separate assaults.

1. In Count II the State alleged that he caused bodily injury to the complainant by striking her head and body with his hands. He was convicted of committing this assault.
2. In Count III the State alleged that he caused bodily injury to the complainant by applying pressure to her throat and neck and blocking her nose or mouth. He was acquitted of this charge.

CR at 66, 91-92.

i. Hypothetically correct jury charge must indicate the same unit of prosecution for which a defendant was tried and convicted.

Here, measuring the sufficiency of the evidence by different assaultive conduct, would be measuring it by an entirely different crime. Doing so is prohibited by this Court's precedent.

The hypothetically correct jury charge must adequately describe the particular offense for which the defendant was tried. *Johnson*, 364 S.W.3d at 294.

This is because a reviewing court must be certain that it is reviewing the identical crime to that alleged in the indictment. *Id.* at 297-98. Because reviewing courts cannot look to an "entirely different offense" than alleged in the indictment, a non-statutory allegation becomes material if it defines, or helps define, the allowable unit of prosecution. *Id.* at 295, 297-98.

The unit of prosecution for bodily injury assault is measured by the injury and the victim. *Landrian*, 268 S.W.3d at 537, 541. Although the manner and means of causing each injury is not material standing alone, it is material if the manner and means is the only method by which each unit of prosecution can be ascertained. *See Johnson*, 364 S.W.3d at 297-98. Here, two bodily injury assaults were alleged. CR at 66. The only method by which each unit of prosecution can be defined is by looking to the injury that was the result of each manner and means alleged. For that reason the manner and means in this case defines the "allowable unit of prosecution" and must be considered material.

Key to the Court's holding in *Johnson v. State* was the fact that only one injury was alleged in that case and therefore the manner and means pled could not affect the "allowable unit of prosecution." *Johnson*, 364 S.W.3d at 293, 298 ("Because the variance in this case involves a non-statutory allegation that does not affect the 'allowable unit of prosecution,' the variance cannot render the evidence legally insufficient to support a conviction."). The *Johnson* Court acknowledged

that if two injuries had been alleged, the analysis would be different and the manner and means might become material. *Id.* at 298.

Here two injuries are alleged in two separate counts: an injury caused by striking the head or body with hands and an injury caused by applying pressure to the throat or neck and blocking the nose or mouth. CR at 66. There are two units of prosecution. The only method of determining the unit of prosecution for each crime is by adhering to the injury that corresponds with the assaultive conduct in each count of the indictment. CR at 66.

The *Johnson* Court repeatedly emphasizes this point: an allegation is only immaterial if the reviewing court can be certain that the State has proven the same offense alleged in the indictment. *Johnson*, 364 S.W.3d at 294-98. By inserting different assaultive conduct into the hypothetically correct jury charge, as the State would have the Court do, it would be measuring the sufficiency of the evidence by a different injury and therefore a different crime. State's Brief at 12, 14-15; *Johnson*, 364 S.W.3d at 295 ("What is essential about variances with respect to non-statutory allegations is that the variance should not be so great that the proof at trial 'shows an entirely different offense' than what was alleged in the charging instrument.").

The State cannot change the relevant assaultive conduct from that described in Count II to that described in Count III. CR at 66. Doing so would measure

sufficiency by an "entirely different offense." *Johnson*, 364 S.W.3d at 295 *quoting Byrd v. State*, 336 S.W.3d 242, 246-47 (Tex. Crim. App. 2011).

The jury unanimity analysis employed by the *Johnson* Court counsels the same conclusion. *Id.* at 296-97. If the charge had asked the jury to find either that Appellant caused bodily injury by striking the complainant on her head and body *or* that he caused bodily injury by applying pressure to her throat or neck and blocking her nose or mouth, a non-unanimous verdict would result. This is because the jury would have been able to convict Appellant based on two separate acts, motivated by separate *mens rea*, and causing two separate injuries without agreeing as to which occurred beyond a reasonable doubt.

The State points to a third instance in the record, which it appears to be arguing constituted bodily injury assault. State's Brief at 14-15. The complainant testified that after about an hour of talking on the patio, Appellant became angry again, said, "You're going to come in this house and suck my cock, bitch", and "he just grabbed my whole body." 5RR at 90-93. The complainant said she did not want to go back in the house, so she screamed and grabbed an object on the patio whereupon he let her go. *Id.* Appellant agreed that they went out to the patio, but described asking her if she wanted to go to bed, endeavoring to pick up the complainant to take her to bed, and putting her down when she screamed. 7RR at

146-47. Even if a jury believed the complainant's testimony beyond a reasonable doubt, Appellant disagrees that her testimony provides evidence of causing "physical pain, illness, or any impairment of physical condition" as required by the assault statute. Tex. Penal Code Ann. §1.07(a)(8) (West); Tex. Penal Code Ann. §22.01(a)(1) (West).

But regardless of whether or not the complainant's testimony provided sufficient evidence of bodily injury assault, what matters here is that the testimony describes a completely distinct unit of prosecution. As argued above, the sufficiency review is predicated on the fact that the reviewing court is assessing the same crime described in the indictment. *Johnson*, 364 S.W.3d at 294-98. Both the conduct and whatever injury the State believes the conduct implies establish a separate unit of prosecution, and cannot form the basis for a sufficiency review here.[7]

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[7] Moreover, Appellant was not charged with a crime for this interaction, which took place an hour after the crimes with which he was charged. 5RR at 89-91; CR at 65-66. As such, the jury had no opportunity to express its judgment as to the credibility of the complainant's testimony. The State cannot infer a jury verdict on an uncharged crime. *Wooley*, 273 S.W.3d at 268; *Dunn*, 442 U.S. at 106-07.

Courts cannot switch units of prosecution on appellate review of sufficiency of the evidence. *Johnson v. State* forbids such a practice and the State's argument to the contrary should be rejected. *Johnson*, 364 S.W.3d at 294-98.

ii. The hypothetically correct jury charge cannot be measured by a crime for which Appellant was acquitted.

"One of the most fundamental rules of double-jeopardy jurisprudence is that when a trial ends in an acquittal, the defendant may not be tried again for the same offense." *State v. Blackshere*, 344 S.W.3d 400, 406 (Tex. Crim. App. 2011); *Ex parte Granger*, 850 S.W.2d 513, 517 (Tex. Crim. App. 1993) (acquittal "acts as an absolute bar to further prosecution"); Texas Const. Art. 1, § 14; U.S. Const. Amends. V, XIV. The Double Jeopardy Clause also embodies the principles of collateral estoppel, which means that once a jury has decided a question of ultimate fact, it cannot be relitigated. *Ex parte Watkins*, 73 S.W.3d 264, 267–69 (Tex. Crim. App. 2002) ("If the jury decides that fact in the defendant's favor, the doctrine of collateral estoppel bars the State from relitigating it in a second criminal trial.").

The State asks this Court to uphold Appellant's aggravated assault conviction because there was evidence at trial that Appellant choked the complainant with his hand while pouring water down her throat. State's brief at 12, 14. The State forgets that Appellant was acquitted of this charge. CR at 92. *Brown v. Ohio*, 432 U.S. 161, 165 (1977) (Double Jeopardy Clause "protects the accused from attempts to relitigate the facts underlying a prior acquittal").

The jury was asked to decide whether Appellant caused bodily injury to the complainant by applying pressure to her neck or throat and blocking her nose or mouth. CR at 87. He was found not guilty of this charge.[8] CR at 92. The State cannot now use these facts, which were already litigated and decided in Appellant's favor, to support a criminal conviction. Doing so would violate "[o]ne of the most fundamental rules of double-jeopardy jurisprudence." *Blackshere*, 344 S.W.3d at 406.

iii. Under the Double Jeopardy Clause Appellant was acquitted of any lesser included crimes.

In a footnote, the State takes the position that, by applying pressure to the complainant's throat or blocking her nose or mouth, Appellant could have caused a bodily injury even if he did not "imped[e] her breath or circulation."[9] State's Brief at 14 n.50. This position, too, is barred by the Double Jeopardy Clause. Once a jury acquits an individual of a charge, the State cannot seek to procure a conviction on a lesser-included crime. *Davis v. Herring*, 800 F.2d 513, 518 (5th Cir. 1986) ("Apart completely both from the *Blockburger* and the same-evidence tests, a trial for one

[8] Appellant was also acquitted of the aggravating elements of his sexual assault charges, namely, that during the same criminal episode as the sexual assault he attempted to kill the complainant by strangulation and waterboarding, he threatened to cause, or place, her in fear that death or serious bodily injury would be imminently inflicted, and that he used or exhibited a deadly weapon, to wit, water. CR at 65; 90. *Davis v. Herring*, 800 F.2d 513, 519 (5th Cir. 1986).

[9] What injury that could be is not apparent from the State's brief, nor is there evidence of some other injury in the trial record.

offense precludes retrial for all lesser-included offenses if at the first trial the accused is acquitted of a charge that contains a lesser-included offense."). This is because when a defendant is acquitted of a charge, he is acquitted of any lesser-included charges as well. *Id.* at 18-19.

Bodily injury assault is a lesser-included offense of strangulation assault because "it differs from the offense charged only in the respect that a less serious injury or risk of injury to the same person…suffices to establish its commission." Tex. Crim. Proc. Code Ann. art. 37.09(2) (West). It is also "established by proof of the same or less than all the facts required to establish the commission of the offense charged." Art. 37.09(1). Comparing the elements of the offense alleged in the indictment to the lesser included crime of assault shows that both crimes require proof that 1) Appellant 2) intentionally, knowingly, or recklessly 3) caused bodily injury to the complainant. §22.01(a)(1), (b)(2); CR at 66; *Hall v. State*, 225 S.W.3d 524, 535–36 (Tex. Crim. App. 2007) (determining whether a crime is a lesser included offense requires comparing the elements of the offense as alleged in the indictment with the elements of the potential lesser included offense); *Amaro v. State*, No. 08-14-00052-CR, 2016 WL 3344568, at *8–9 (Tex. App.—El Paso June 14, 2016) (mem. op., not designated for publication) (bodily injury assault is a lesser included offense of strangulation assault); *Harrison v. State*, No. 06-11-

00196-CR, 2012 WL 1813519, at *5–6 (Tex. App.—Texarkana May 18, 2012) (mem. op., not designated for publication) (same).

By acquitting Appellant of strangulation assault, he was acquitted of the lesser offense of causing bodily injury to the complainant. CR at 87, 92. The State cannot escape the consequences of the jury's acquittal by describing an injury different from impeding breathing or circulation that could have resulted from Appellant grabbing the complainant's throat or blocking her nose and mouth.

iv. Under the Double Jeopardy Clause, Appellant cannot be convicted of a greater crime than the one for which he was acquitted.

The Double Jeopardy Clause also bars a conviction for a crime greater than the one for which a defendant was acquitted. *Davis*, 800 F.2d at 518-19. Because Appellant was found not guilty on Count III of the indictment, the Double Jeopardy Clause protects him from relitigation of the facts underlying that Count, including whether he caused bodily injury by putting pressure on the throat or neck or blocking the nose or mouth of the complainant. *Id.*; CR at 92; *Brown*, 432 U.S. at 168 (whether the conviction for the greater precedes the lesser or *vice versa*, "the sequence is immaterial"). Thus, the State cannot procure a conviction now based on Appellant causing bodily injury to the complainant *plus* using or threatening to use a deadly weapon when he has been acquitted of causing bodily injury to the complainant.

2. State's second contention in second issue: measuring aggravated assault by the criminal episode.

i. The plain language of the statute and this Court's precedent requires that the deadly weapon be used or exhibited when the gravamen of the assault took place.

The State asks the Court to hold that an assault is aggravated if a deadly weapon is exhibited anytime "during a continuing assaultive incident." State Brief at 15. It argues that, if a defendant commits multiple assaults during one evening, all of the assaults are aggravated if a deadly weapon was used or exhibited during any of the assaults. *Id.* at 14-15.

The State's argument is untenable under this Court's precedent and the statutory language of the aggravated assault statute. An assault is aggravated only if a deadly weapon is exhibited "during the commission of the assault." Tex. Penal Code §22.02(a)(2). The statute does not authorize a conviction where the weapon was merely exhibited "during a criminal episode."

"During the commission of" a crime refers to the time during which the gravamen of the crime was committed. *Johnson v. State*, 777 S.W.2d 421, 421-23 (Tex. Crim. App. 1989) ("during the commission" refers to the physical attack itself, while "during the course of the same criminal episode" included actions taken before the attack took place); *Cates v. State*, 102 S.W.3d 735, 736-39 (Tex. Crim. App. 2003) (finding that "the relevant time period for determining whether

[appellant's] truck was used and exhibited as a deadly weapon" was when the gravamen of the offense of failing to stop and render aid took place).

The gravamen of aggravated assault is causing bodily injury. *Landrian*, 268 S.W.3d at 536–37, 541. Thus, a reviewing court must look to the time period in which Appellant caused bodily injury in order to see if a deadly weapon was used or exhibited "during the commission of the assault." Here, there was no evidence that Appellant used or exhibited water while inflicting bodily injury on the complainant, i.e., while he struck her head and body with his hands. 5RR at 72-89. *See Brief of Appellant Before the Sixth Court of Appeals* at 24-28.

Moreover, in order to be used or exhibited during the commission of the assault, the deadly weapon must, in some manner, help facilitate the commission of the assault. *Plummer v. State*, 410 S.W.3d 855, 865 (Tex. Crim. App. 2013) ("The deadly weapon must, in some manner, help facilitate the commission of the felony."). *See also McCain v. State*, 22 S.W.3d 497, 502 (Tex. Crim. App. 2000) (cases interpreting using or exhibiting a deadly weapon in the context of punishment were relevant to interpreting similar language in aggravated robbery statute). Water did not help facilitate the commission of the assault at issue here. Water was not in Appellant's possession, nor was it discussed or referred to by any person before the assault was complete. 5RR at 72-80.

Finally, the State's argument in its second issue would require viewing bodily injury assault as a continuing offense. State's Brief at 14-16. This is because the Court would have to hold that the gravamen of assault continues, even after the *actus reus* has completed the injury of another person. This view is not consistent with the case law. "Generally, when each of the elements of a crime have occurred, the crime is complete." *Barnes v. State*, 824 S.W.2d 560, 562 (Tex. Crim. App. 1991) *overruled on other grounds by Proctor v. State*, 967 S.W.2d 840 (Tex. Crim. App. 1998). A crime should not be considered continuous unless the explicit language of the criminal statute or the nature of the crime itself compels that conclusion. *Id.* The Court of Criminal Appeals has held that aggravated assault is complete with the injury of single individual. *Phillips v. State*, 787 S.W.2d 391, 395 (Tex. Crim. App. 1990) (*en banc*). Neither this Court's precedent, nor the plain language of the statue, allow for the State's interpretation. §22.01(a)(1).[10]

The State believes that assault by injury should not be viewed "as a discrete instance in time beginning and ending with the infliction of injury." State's Brief at

[10] In addition, as discussed above, Appellant was acquitted of the assault in Count III, including the *actus reus* that he applied pressure to the complainant's throat or neck and blocked her nose and mouth. This is a question of ultimate fact that was resolved in Appellant's favor and the Double Jeopardy Clause forbids using it now to support a different conviction. *Ex parte Watkins*, 73 S.W.3d at 267–69. There is no other evidence in the record of using or exhibiting water, nor was there evidence that he threatened the complainant with water aside from her testimony that he used it to block her nose or mouth. 5RR at 80-81, 83-84.

16. But it does not address the fact that this is exactly how this Court's precedent says bodily injury assault should be viewed: it is the infliction of injury on another person. *Landrian*, 268 S.W.3d at 537, 540-41; *Phillips*, 787 S.W.2d at 395. There is no basis in the law for deciding that an assault continues after the *actus reus* has achieved its intended result.

At trial the State took advantage of the same body of law it now decries. It indicted Appellant for two separate assaults, each stemming from a discrete assaultive event. CR at 66. Now, it argues that this was only one "continuing assaultive incident." State's Brief at 15. Its current contention that the gravamen of the first assault continued through the second alleged assault would have prevented it at trial from dividing up a "continuing assaultive incident" into separate units of prosecution. *See Ex parte Hawkins*, 6 S.W.3d 554, 555 n.6 (Tex. Crim. App. 1999) ("…when a statute sets no temporal limits on an offense, a prosecutor may not bring multiple charges by arbitrarily dividing a range of time into separate fragments.").

The court below was correct that aggravated assault by using or exhibiting a deadly weapon must occur during the commission of the underlying assault. *Hernandez*, 2016 WL 4256938, at *6. Looking to conduct during subsequent alleged crimes is not sanctioned by Texas law and the State's contentions to the contrary should be overruled.

ii. Policy Considerations

The State argues that there is a line-drawing problem with viewing bodily injury assault as complete when the prohibited result has been accomplished. State's Brief at 17. It says that this would allow the State to bring multiple assault charges against a defendant who caused multiple injuries during a single minutes-long assault and this would result in over-charging. *Id.* The State's concern implicates a principle espoused in the Double Jeopardy Clause, which says that if multiple offenses are committed during a "single criminal act and impulse, then the offenses merge and the defendant may be punished only once." *Aekins v. State*, 447 S.W.3d 270, 274–75 (Tex. Crim. App. 2014). This principle recognizes that, even where a crime is not a "continuous crime," it still may be possible for a statute to be violated multiple times even though, under the Double Jeopardy Clause, the incident constituted only one crime. *Id.* For this reason, unless "each criminal act is a separate and distinct one, separated by time" multiple punishments under the same statute generally cannot stem from one criminal impulse. *Id. citing Blockburger v. United States*, 284 U.S. 299, 301-02 (1932).

This potential line-drawing problem in bringing criminal charges is not unique to assault, but is present whenever it is possible to make "a hypertechnical division of what was essentially a single act." *Aekins*, 447 S.W.3d at 281 (internal quotations omitted). The Court has said that avoiding this double jeopardy pitfall

requires using "common-sense" and evaluating whether there was a "fresh impulse" or "fork-in-the-road" indicating a separate criminal act. *Id.* at 281-82.

The line-drawing problem raised by the State is not presented in this case. After striking the complainant with his hands, the complainant asked Appellant to get her a glass of water. He left the room. Only upon returning did the separate alleged assault begin. 5RR at 76-81. These two assaultive incidents "occurred in identifiable, discrete stages", *Urtado v. State*, 333 S.W.3d 418, 425 (Tex. App.—Austin 2011), and resulted from a "fresh impulse" or "fork-in-the-road." *Aekins*, 447 S.W.3d at 281–82.

Moreover, the State does not cite any examples of this sort of over-charging occurring. State's Brief at 17. Certainly here, the prosecutor was able to use a "common-sense" assessment of what constituted the same or separate criminal acts, as he did not charge Appellant for each slap of his hand, but rather recognized that the conduct taken together amounted to only one assault. *Aekins*, 447 S.W.3d at 282; CR at 66.

The State also worries that a defendant could escape liability for aggravated assault by brandishing a gun, putting the weapon in his pocket during an assault, and then pulling the gun out a second time once the assault is complete. State's Brief at 16. This concern is unfounded. As discussed above, the question is whether a deadly weapon facilitated the underlying offense. *Plummer*, 410 S.W.3d

at 865. The Court of Criminal Appeals has held that a knife in an assailant's back pocket during a violent attack was "used or exhibited" as a deadly weapon because it was used to instill apprehension in the victim and reduce the likelihood of resistance. *McCain*, 22 S.W.3d at 503. The question in the State's example would be whether the victim knew the assailant had a gun on his person and whether the presence of the gun helped to facilitate the assault by instilling apprehension and reducing the likelihood of resistance. An aggravated assault conviction would by no means be barred simply because the assailant had placed the gun in his pocket. *Id.*

Moreover, the State's policy concerns are not applicable to the facts of this case. The problem of proof in Appellant's trial was that no water was shown to have been exhibited or used, or threatened to be exhibited or used, at any point prior to or during the offense at issue here. The complainant had no apprehension that water would be used in any manner prior to or during the commission of the offense. 5RR at 72-81. The Sixth Court of Appeals was correct that the time period when the assault was committed was the period in which the deadly weapon must be used or exhibited. *Hernandez*, 2016 WL 4256938, at *6. Its decision to overturn Appellant's aggravated assault conviction should be affirmed.

PRAYER

For the foregoing reasons, Appellant respectfully requests that this Court affirm the decision of the Sixth Court of Appeals, reversing his aggravated assault conviction for insufficient evidence of the aggravating element and grant him any other relief justice requires.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Pursuant to Texas Rule of Appellate Procedure 9.4(i)(2), I certify that this brief contains 9,978 words (excluding the caption, identity of parties, table of contents, table of authorities, statement of the case, statement of procedural history, signature, certificate of service, and certificate of compliance). This is a computer-generated document using at least 14-point typeface for all text, except for footnotes which are in 12-point typeface. In making this certificate of compliance,

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/s/ Karen E. Oprea
Karen E. Oprea
Attorney for Appellant
Teodoro Hernandez

CERTIFICATE OF SERVICE

By affixing my signature above, I hereby certify that a true and correct copy of the foregoing APPELLANT'S RESPONSE BRIEF, was e-served to the office of the State Prosecuting Attorney and e-served to Attorney for Appellee, Brian Erskine, Hays County Criminal District Attorney's Office, on April 10, 2017.